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Nasir bin Ramli v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(M)-244–04 OF 2018
ZABARIAH MOHD, SURAYA OTHMAN AND KAMALUDIN MD SAID JJCA
1 JULY 2021

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Criminal Law — Murder — Intention — Whether intention to kill present — Appellant convicted of murder — Whether conviction should be substituted with culpable homicide not amounting to murder — Whether prosecution had proven charge of murder — Whether there was evidence of intention to murder — Whether defence had raised reasonable doubt — Penal Code ss 302 & 304(a)

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The appellant was charged under s 302 of the Penal Code for the murder of one Norfisa bt Othman, the deceased. The High Court found the appellant guilty of the offence of murder and sentenced him to death accordingly. The appellant appealed against the High Court's decision. The learned trial judge found that the accused had failed to raise a reasonable doubt against the prosecution's case and on the contrary, the prosecution had proven its case beyond reasonable doubt. Learned counsel for the appellant submitted that the appellant had no intention to murder the deceased. Therefore, the charge against the appellant should have been reduced to one punishable under s 304(a) of the Penal Code. It was further submitted that the abrasions and bruises sustained by the deceased supported the appellant's defence that the deceased had fallen off the bonnet of the car and sustained her injuries. Therefore, the actions of the appellant did not cause the death of the deceased. Counsel for the appellant argued that Dr Nurina bt Ahmad ('PW19') was only requested to do the autopsy on the deceased on 8 June 2016. As such, the injuries sustained by the deceased could have occurred at any time between 1.36am when deceased was pronounced dead on 6 June 2016, and 8 June 2016. Further, PW19 had testified that she could not remember if she had found any injuries on the deceased body before she did the post mortem. The appellant's counsel further contended that the search list ('P14') showed that PW5 was the one who had found P9 on his own accord and the appellant gave no information leading to discovery of P9. There was no evidence that PW5 had administered a caution to the appellant before obtaining the alleged information leading to discovery.

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Held, allowing the appeal:

(1) Having examined the records of appeal and the submissions by counsels, the court found that the prosecution had failed to prove the charge under s 302 of the Penal Code. However, there was sufficient evidence to convict the appellant for an offence of culpable homicide not amounting to murder, which was punishable under s 304(a) of the Penal Code. The court was of the opinion that in view of the nature of the injuries sustained by the deceased and the conduct of the appellant, there was no evidence that the appellant had an intention to murder the deceased. However, there was evidence of an intention on the part of the appellant to cause bodily injury to the deceased (see paras 43 & 46).

(2) The act of the deceased who jumped onto the appellant's car bonnet while it was moving and then fell off from the car when the car stopped or braked were consistent with the abrasions and bruises sustained by the deceased. The evidence presented by the pathologist, PW2 was consistent with the deceased falling off the bonnet of the car when the appellant stated that he suddenly stopped the car as there was a road bump ahead of him. PW2 had stated that in her opinion, the injuries sustained by the deceased could have been caused by something blunt and hard, for example if the deceased was being hit by a blunt object such as wood, iron or any similar object or if she fell onto something hard and blunt. That being the case, and taking her post mortem report into consideration, the court was of the view that it did not rule out that the injuries were sustained from the falling effect of the deceased from the car when the car stopped or braked which injuries resulted in the deceased's death. The defence version had raised a credible and reasonable doubt to the prosecution's version (see para 47).

(3) By looking at the act of the appellant in the incident, it could be concluded that there was nothing to show that the appellant had an intention to murder the deceased. There was no evidence of intention other than what could be inferred from the act of the accused. From the conduct of the appellant which brought the deceased back to his house right after the incident, it could be inferred that he had no intention to cause the deceased's death. On a totality of the evidence, the prosecution had failed to establish a prima face case under s 300 against the appellant. The act of the appellant was that of an intention to cause such bodily injury that was likely to cause death. The appellant's act fell squarely within s 299 of the Penal Code (see paras 49–51).

[Bahasa Malaysia summary

Perayu telah didakwa di bawah s 302 Kanun Keseksaan kerana membunuh seorang Norfisa bt Othman, si mati. Mahkamah Tinggi mendapati perayu bersalah atas kesalahan membunuh dan menjatuhkan hukuman mati kepada beliau. Perayu merayu terhadap keputusan Mahkamah Tinggi. Hakim perbicaraan yang bijaksana mendapati tertuduh gagal menimbulkan keraguan

munasabah terhadap kes pendakwaan dan sebaliknya, pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Peguambela perayu yang bijaksana berpendapat bahawa perayu tidak berniat untuk membunuh si mati. Oleh itu, pertuduhan terhadap perayu sepatutnya dikurangkan kepada satu yang boleh dihukum di bawah s 304(a) Kanun Keseksaan. Ianya dihujahkan lagi bahawa kesan melecet dan lebam yang dialami oleh si mati menyokong pembelaan perayu bahawa si mati telah terjatuh dari bonet kereta dan mengalami kecederaannya. Oleh itu, tindakan perayu tidak menyebabkan kematian si mati. Peguambela perayu menghujahkan bahawa Dr Nurina bt Ahmad ('PW19') hanya diminta untuk melakukan bedah siasat ke atas si mati pada 8 Jun 2016. Oleh yang demikian, kecederaan yang dialami oleh si mati boleh berlaku pada bila-bila masa antara jam 1.36 pagi apabila si mati telah disahkan meninggal dunia pada 6 Jun 2016, dan 8 Jun 2016. Selanjutnya, PW19 telah memberi keterangan bahawa beliau tidak ingat sekiranya beliau menemui sebarang kecederaan pada mayat si mati sebelum beliau melakukan bedah siasat. Peguambela perayu seterusnya menghujahkan bahawa senarai siasatan ('P14') menunjukkan bahawa PW5 adalah orang yang telah menemui P9 dengan sendirinya dan perayu tidak memberikan maklumat yang membawa kepada penemuan P9. Tiada bukti bahawa PW5 telah memberikan amaran kepada perayu sebelum mendapatkan maklumat yang didakwa membawa kepada penemuan.

Diputuskan, membenarkan rayuan:

(1) Setelah meneliti rekod rayuan dan hujahan oleh peguambela, mahkamah mendapati pihak pendakwaan telah gagal membuktikan pertuduhan di bawah s 302 Kanun Keseksaan. Walau bagaimanapun, terdapat keterangan yang mencukupi untuk mensabitkan perayu atas kesalahan mematikan orang dengan salah yang tidak terjumlah kepada membunuh, yang boleh dihukum di bawah s 304(a) Kanun Keseksaan. Mahkamah berpendapat bahawa memandangkan jenis kecederaan yang dialami oleh si mati dan kelakuan perayu, tiada keterangan bahawa perayu mempunyai niat untuk membunuh si mati. Walau bagaimanapun, terdapat keterangan niat di pihak perayu untuk menyebabkan kecederaan anggota badan kepada si mati (lihat perenggan 43 & 46).

(2) Tindakan si mati yang melompat ke atas bonet kereta perayu semasa ia bergerak dan kemudian terjatuh dari kereta apabila kereta tersebut berhenti atau membrek adalah konsisten dengan kesan melecet dan lebam yang dialami oleh si mati. Keterangan yang dikemukakan oleh pakar patologi, PW2 adalah konsisten dengan si mati terjatuh dari bonet kereta apabila perayu menyatakan beliau secara tiba-tiba memberhentikan kereta kerana terdapat bonggol jalan di hadapannya. PW2 telah menyatakan bahawa pada pendapatnya, kecederaan yang dialami oleh si mati mungkin disebabkan oleh sesuatu yang tumpul dan

keras, contohnya sekiranya si mati dipukul oleh objek tumpul seperti kayu, besi atau apa-apa objek yang serupa atau sekiranya beliau terjatuh ke atas sesuatu yang keras dan tumpul. Oleh itu, dan dengan mengambil kira laporan bedah siasatnya, mahkamah berpendapat bahawa ia tidak menolak kecederaan yang dialami akibat kesan jatuh si mati dari kereta apabila kereta tersebut berhenti atau membrek yang mana kecederaan telah mengakibatkan kematian si mati. Versi pembelaan telah menimbulkan keraguan yang boleh dipercayai dan munasabah berbanding versi pendakwaan (lihat perenggan 47).

(3) Dengan melihat kepada perbuatan perayu dalam kejadian tersebut, ianya boleh disimpulkan bahawa tiada apa yang menunjukkan perayu mempunyai niat untuk membunuh si mati. Tiada keterangan niat selain daripada apa yang boleh disimpulkan daripada perbuatan tertuduh. Daripada kelakuan perayu yang membawa si mati pulang ke rumahnya sejurus selepas kejadian tersebut, boleh disimpulkan bahawa beliau tidak berniat untuk menyebabkan kematian si mati. Pada keseluruhan keterangan, pihak pendakwaan gagal membuktikan kes prima face di bawah s 300 terhadap perayu. Perbuatan perayu adalah berniat untuk menyebabkan kecederaan badan yang mungkin boleh menyebabkan kematian. Perbuatan perayu jatuh tepat dalam s 299 Kanun Keseksaan (lihat perenggan 49–51).]

Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Juraimi bin Husin v PP [1998] 1 MLJ 537, CA (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265, SC (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Lee Fah Sang v PP [1967] 2 MLJ 163, FC (refd)
Lim Heng Soon & Anor v PP [1970] 1 MLJ 166, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 MLRA 158, SC (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497, CA (refd)
Shah Rehan bin Abdul Rahman v PP [2015] 3 MLJ 337, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Evidence Act 1950 ss 24, 27
Penal Code ss 299, 300, 300(a), (b), (c), (d), 302, 304(a)

Appeal from: Criminal Trial No MYY-45B-2/1 of 2017 (High Court, Miri)

Ranbir Singh Sangha (Ranbir S Sangha & Co) for the appellant.
Ahmad Sazilee bin Abdul Khairi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Suraya Othman JCA (delivering judgment of the court):

INTRODUCTION

[1] Nasir bin Ramli ('the appellant') was charged under s 302 of the Penal Code for the murder of one Norfisa bt Othman (KP 900913–13–6062) ('the deceased'). On 29 March 2018, the learned judge of the High Court in Miri, Sarawak found the appellant guilty of the offence of murder and sentenced him to death accordingly. The appellant now appeals to this court.

[2] The charge against the appellant reads as follows:

> That you, on 5th June 2016 at about 11 am until 1 am on 6th June 2016, at Jalan Dato' Permaisuri 2C, Permyjaya, in the district of Miri, in the State of Sarawak, with the intention of committing murder, did cause the death of Norfisa binti Othman (P) No KP: 900913-13-6062, and you have thereby committed an offence which is punishable under section 302 of the Penal Code.

BRIEF FACTS

[3] Sifwandi bin Othman ('PW10') who is the elder brother of the deceased, testified that on the 5 June 2016 at about 10pm, at their family house at Permyjaya, the deceased asked for his permission to go out to meet her friend. When the deceased did not return home after she went out on the night of 5 June 2016, PW10 then lodged a police report on the 7 June 2016 ('exh P6').

[4] Corporal Norhayati @ Elsie ak Peter Kiang ('PW5') was on duty at the enquiry counter, central police station ('CPS'), Miri on 6 June 2016 and at about 1.20am she received a phone call from the medical assistant named Anslem, of Miri Hospital informing her that an unconscious female patient was sent into the hospital in a critical condition with foam and blood coming out from her mouth. PW5 then informed Insp Noor Rahimah ('PW8') about the information she had just received for PW8's necessary action.

[5] On the same day, at about 2.05am Corporal Henry ak Sandai ('PW7'), while on duty at the enquiry counter, CPS Miri received a phone call from PW8 and was informed that the said female patient had already passed away. He lodged a police report, marked as exh P15.

[6] PW8 testified that upon receiving the information from PW5, she immediately went to the Miri Hospital to check on the condition of the said female patient. On arrival, she saw that the doctors were treating and trying to save the female patient's life at the emergency unit of Miri Hospital. At about 2am, one of the doctors who treated the victim informed PW8 that the said

female patient had passed away. PW8 immediately called CPS Miri and informed PW7 accordingly. This female patient is identified as the deceased in the present case.

[7] Ahmad Fayri bin Suani ('PW9') is a medical assistant who received the deceased at the entrance of the emergency unit, Miri Hospital. The deceased came in a car driven by the accused's father by the name of Ramli bin Yusuf ('PW13'). PW13 was accompanied by his wife and his daughter when he sent the deceased to Miri Hospital.

[8] PW9 testified that when the said car arrived at the emergency unit, Miri Hospital, he was approached by one lady asking for his help. He went to the said car and found the deceased lying on another lady's lap at the back-passenger seat of the car. He checked on the deceased's condition and found that there was no pulse. He also noticed that there were vomit stains on the deceased's face. With the assistance of his colleague, Anslem, he immediately lifted up the deceased onto the trolley and performed the CPR before proceeding to the red zone. At the red zone they handed over the deceased to Dr Patrick ('PW15') who was the doctor in charge at that material time.

[9] The evidence of the accused's father, PW13 was that the deceased and the accused were lovers and the accused had on previous occasions brought the deceased to their family house at Lot 11268, Jalan Perdana 5, Tudan Desaras, Miri.

[10] PW13 testified that when the accused was at their house, he complained that the deceased had blocked his handphone number. The accused later went out that night using PW13's car ie a Proton Iswara Aeroback with registration No QTC 8167 and upon returning home at around 11pm that night, PW13 noticed the deceased was sitting on the front passenger seat of the car parked outside the house in a state of semi-consciousness. When he inquired what happened to the deceased, the accused replied that the deceased had fallen off from the car when the car driven by him was still moving.

[11] As the accused refused to send the deceased to the hospital, PW13 volunteered to send the deceased to the Miri Hospital accompanied by his wife and daughter. On arrival at the Miri Hospital, they were met by PW9 who then took charge of the deceased.

[12] PW13 in his evidence told the court that he had informed PW9 that he had found the deceased by the roadside because he was too scared to tell the truth as this was his first experience in handling such a situation.

[13] The autopsy of the deceased was conducted by Dr Nurina bt Ahmad ('PW19'), the forensic medical doctor on 9 June 2016 at about 10am at Miri Hospital. However, PW19 ceased performing the autopsy after she discovered hematoma (blood clot) under the scalp and fracture of the skull on the head of the deceased which was suspicious in nature. PW19 then contacted PW2, a senior pathologist to continue with the post mortem.

[14] On 12 June 2016 at about 8.45am, Dr Norliza bt Ibrahim ('PW2') conducted a further autopsy on the deceased at Miri Hospital. In her autopsy report ('exh P7'), she stated that the cause of the deceased's death was head injury due to blunt force trauma.

[15] The investigating officer of the case is ASP Dorairajah ('PW3'). In his initial investigation, he found that the deceased had previously lodged two police reports, dated 6 May 2016 ('exh P21') and 12 May 2016 ('exh P22') respectively. In the first report, the deceased had complained that she was beaten by the accused and in the second report, the deceased complained that she was threatened by the accused with the words 'jaga-jaga kitak lepas tok' (which literally means 'you watch out after this'). The threat was issued as the accused was not happy with the deceased for lodging the first police report.

[16] On 24 August 2016, the accused was arrested by DSP Sarifuddin bin Mustapha ('PW4') in a house at Lot 197 Kpg Semariang Batu, Kuching. The accused was found hiding underneath the bed inside the bedroom of the said house. The accused was later escorted and flown from Kuching to Miri to obtain a remand order at Miri court.

[17] On the 31 August 2016, Nasrul Hadi bin Jahat ('PW6') recovered the iron rod ie 'besi pemotong kertas' ('exh P9') from the accused family house at Lot 11268 Tudan Desaras. The iron rod was found inside a toolbox at the front area of the said house. The recovery of exh P9 was linked to it being the weapon used by the accused to kill the deceased.

[18] According to PW13, exh P9 was kept by him in his Proton car for his protection whenever needed during his employment as a bouncer a few years back.

THE CASE FOR THE PROSECUTION

[19] At the close of the prosecution's case, learned deputy public prosecutor submitted that they had established a prima facie case against the appellant. Having regard to the charge, the burden is on the prosecution to prove the following elements of the offence of murder as provided under ss 299 and 300 of the Penal Code:

(a) that the deceased had died due to the bodily injuries she suffered; A

(b) that the injuries were caused by the appellant; and

(c) that the act of the appellant in inflicting such injuries on the deceased came within the ambit of any one of the four circumstances listed in s 300(a)–(d) of the Penal Code. B

[20] The family members of the deceased ('PW10 and PW11'), the pathologist ('PW2') and the rest of the medical team had identified the body of the deceased. The deceased was confirmed to be Norfisa bt Othman who was pronounced dead upon her admission into Miri Hospital. C

[21] According to the evidence of the forensic pathologist, PW2, through her examination, she had found that there was blunt force trauma to the deceased's head as evidenced internally by the bruising underneath the scalp and also the fractured skull. She was of the view that the injury to the head had subsequently caused bleeding to the brain which was fatal in nature. She formed the opinion that the fracture of the skull was more consistent with a person who had been hit on the head by a blunt and hard object rather than a person who had fallen to the ground. She further stated that the injury on the head of a person after a fall usually would be seen at the back or at the side of the head. D E

[22] The prosecution argued that the evidence of the appellant's father had linked the murder of the deceased to the appellant. The appellant was last seen with the deceased on that night at around 11pm when he returned to the family house at Tudan Desaras. As the appellant had refused to send the deceased to the hospital and the deceased was left on her own inside the Proton car in a semi-conscious state, PW13 then accompanied by his wife and daughter had to send the deceased to the hospital. F G

[23] PW12 (Nurul Safiqah bt Roslan) is the cousin of the deceased. She testified in court that the deceased had told her that she had been beaten by the appellant and that the appellant was having an affair with another woman. The deceased had also told her that she intended to block the appellant from viewing her Facebook. H

[24] The prosecution submitted that the conduct of the appellant clearly showed that he had intention to kill the deceased. The evidence of PW13 who testified that the appellant was very angry, and was in a bad mood before he left the house that night and his complaint of his handphone being blocked by the deceased are relevant to show his intention to kill the deceased. I

[25] PW13's evidence was corroborated by the evidence of the investigating officer, PW3 where according to PW3 the appellant had told him that he was angry with the deceased because the deceased had blocked his handphone number. The appellant sent a WhatsApp message to the deceased asking the deceased to meet up with him. The appellant then went out by using his father's car.

FINDINGS OF TRIAL JUDGE AT THE END OF PROSECUTION'S CASE

[26] At the end of prosecution's case, the learned judge concluded that the prosecution had proved a prima facie case against the appellant and called the appellant to enter his defence.

THE DEFENCE CASE

[27] In defence, the appellant elected to testify on oath.

[28] The appellant gave evidence that he had a fight with the deceased when the deceased had discovered that he had checked into a hotel with a Thai woman. On the day of the incident, he testified that he had sent a WhatsApp message to the deceased to request for a meeting with her. When they met at a place at Permyjaya, the deceased suddenly became angry and knocked on the driver side window using her handphone. The appellant did not open the window but drove slowly ahead while the deceased chased after him. Suddenly the deceased jumped onto the front bonnet of the car. As the appellant continued driving and upon seeing a road bump in front, he pressed his brake which caused the deceased to fall off the car. The appellant then came out from the car and saw the deceased lying on the road in a state of semi-consciousness. The deceased's nose was bleeding and there was foam coming out from her mouth.

[29] The appellant saw the deceased fell backward and her head hit the road first. He then carried the deceased and seated her on the front passenger seat of the car and drove back home. When they arrived, the appellant carried the deceased out of the car and laid her on the sofa outside the house. Later, his father came and inquired what had happened to the deceased and his reply was that the deceased had fallen off from the car.

[30] Norilah bt Ramli, ('DW2') is the appellant's younger sister who sent the deceased to Miri Hospital together with her father. She testified that she had little knowledge of what had transpired on that night. She further stated that it

was her father who had inquired the accused as to what had happened and the only thing that she knew was that the deceased was injured and needed medical attention.

[31] The appellant's elder sister, Norzaharah bt Ramli ('DW3') testified that she was not in Miri when the incident happened. She further testified that she knew the deceased as the deceased had stayed with her in Kuching. She stated that the deceased had told her that the deceased was always beaten by the deceased's brother. She also testified that the problems in the relationship between the appellant and the deceased began when the appellant had another relationship with a Thai woman.

FINDINGS OF THE HIGH COURT JUDGE AT THE END OF TRIAL

[32] After hearing the evidence of the appellant, the learned judge made a maximum evaluation of the evidence as a whole and then proceeded to find the appellant guilty as charged.

[33] The learned judge made the following findings:

> [68] Having carefully considered the totality of evidence at the conclusion of the case, I find that the strength of each individual strand of the above evidence, when combined or twisted together, is strong enough to lead us to the irresistible inference and conclusion that it was the accused who had intentionally caused the bodily injuries, in particular, the head injuries suffered by the deceased which led to her death.
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> [69] I found that the defence raised by the accused is a mere denial and the accused's version is not reasonable which was created for the sake of avoiding conviction.
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> [70] The head injuries which is fatal to cause the death of the deceased could not have been caused by a fall from the car if the accused claimed to have driven it slowly but the fracture of the middle frontal part of the deceased's head and the fracture of the skull of the deceased was more consistent with the injuries sustained due to being hit on the head by a hard and blunt object such as being hit by exh P9.
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> [71] There was no reason for the accused to lock up his car in order to prevent the deceased from entering it as it was him who intended to meet the deceased in the first place as he claimed to have sent the Whatsapp messages to the deceased prior to the meeting. It follows that there was no reason why the deceased would have knocked on the windscreen of the driver's seat of the car to gain entry into the car.
>
> [72] The accused admitted that he was not afraid of the deceased and alleged that the deceased was angry at that material time which was why he locked up the door of the car. This defence is unacceptable because there was no reason why the deceased should be angry with the accused because the meeting was agreed to discuss and to sort things out between them. Furthermore, the discussion had not even started yet as she could not get into the locked car if the claimed made by the accused is true.

A [73] The accused should not have been intimidated by the deceased even if she was in the state of anger because it was proven through the previous police reports which showed that the accused was, in fact, the real attacker to the extent of making a threatening remark which compromising (sic) the life of the deceased.

B [74] If the allegation of the accused and his sister were true that the deceased's brother had beaten the deceased, then why there was no cross-examination on this issue when the deceased's brother PW10 gave evidence in the witness box.

C [75] The accused had the clear intention to kill the deceased from the conduct of the accused on the said night when he was making noises and very angry because of his handphone had been blocked by the deceased. When he returned back to his house a few hours later, he was seen with the deceased who was in bad condition and left the deceased behind unattended in the said car thereby refusing her of the required medical attention.

D [76] There was a reason for the accused to be angry which culminates from the breakdown of his relationship with the deceased. The accused was not happy with the deceased when the latter had decided to end their relationship.

[34] Ultimately, the learned trial judge found that the accused had failed to raise a reasonable doubt against the prosecution's case and on the contrary, the E prosecution had proven its case beyond reasonable doubt. The learned High Court judge found that the appellant is guilty of the offence charged and convicted the appellant under s 302 of the Penal Code.

THE APPELLANT'S SUBMISSION

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[35] Before us, learned counsel for the appellant submitted that the appellant had no intention to murder the deceased. The act of the appellant who brought the deceased to his family house showed that he had no intention to murder her. There was also no evidence to show that the appellant had G brought the deceased back to his family house in order to dispose of her body. Counsel for the appellant argued that, if the appellant had intended to murder the deceased, the appellant would have left her to die at the place where she had sustained her injuries. Therefore, the learned counsel submitted that the charge against the appellant should have been reduced to one punishable under H s 304(a) of the Penal Code.

[36] It was further submitted that the abrasions and bruises sustained by the deceased supported the appellant's defence that the deceased had fallen off the bonnet of the car and sustained her injuries. The evidence of Dr Patrick Tan I Hoon Pang ('PW15'), the doctor who had first treated the deceased should have been taken into consideration because during cross-examination, he had stated that when he examined the deceased for injuries, he had found none. Therefore, counsel for the appellant submitted that the actions of the appellant did not cause the death of the deceased.

[37] Counsel for the appellant argued that Dr Nurina bt Ahmad ('PW19') was only requested to do the autopsy on the deceased on 8 June 2016. As such, the injuries sustained by the deceased could have occurred at any time between 1.36am (when deceased was pronounced dead) on 6 June 2016 and 8 June 2016. Further, PW19 had testified that she could not remember if she had found any injuries on the deceased body before she did the post mortem.

[38] Further, the appellant's counsel contended that the search list ('P14') showed that PW5 was the one who had found exh P9 on his own accord and the appellant gave no information leading to discovery of exh P9. There was no evidence that PW5 had administered a caution to the appellant before obtaining the alleged information leading to discovery.

THE PROSECUTION'S SUBMISSION

[39] In response, the learned deputy public prosecutor submitted that the deceased had died as a result of the bodily injuries suffered by the deceased, particularly the head injury which is fatal in nature and can only be caused by being hit with a hard and blunt object like the iron rod which was seized by the police in this case. The prosecution submitted that the contention by the defence that the deceased had fallen off from a moving car is totally rejected by the findings of PW2. Further, there were no injuries like grazing abrasions which are typical to be found on a person who had fallen off from a moving vehicle. PW2 had testified that the injury to the head which subsequently caused bleeding of the brain were fatal in nature. The fractured skull was more consistent with a situation where a person had been hit on the head by a blunt object rather than a person who had fallen off from a car.

[40] The learned deputy public prosecutor further submitted that, circumstantially, the conduct of the appellant in trying to hide the actual incident, refusal to bring the deceased to the hospital and absconding after the incident, showed that the appellant had intention to kill the deceased.

[41] Mens rea or intention on the part of the appellant to cause death of the deceased can be inferred from the facts derived from the witnesses' testimonies especially, the testimonies of PW2, PW19 and PW13 and the post mortem report. The prosecution submitted that most of the injuries were found on the deceased's head and this showed that it was intended to cause fatal injuries to the vital part of the body which can cause death to the deceased. Thus, the prosecution contended that the element of s 300(c) of the Penal Code had been proved by the prosecution as the appellant knew that the weapon used by him (exh P9) could have caused fatal injuries to the deceased head.

[42] The prosecution submitted that DW3's evidence should be treated with caution by the court as her testimony was tainted. The prosecution further submitted that the learned trial judge was correct in admitting exh P9 as the murder weapon in this case. The discovery made by PW6 was led by the appellant's information under s 27 of the Evidence Act 1950 and did not contain any admission under s 24 of the Evidence Act 1950.

OUR DECISION

[43] We have examined the records of appeal and the submissions by counsels and we found that the prosecution had failed to prove the charge under s 302 of the Penal Code. However, having carefully considered and having re-evaluated all the evidence before us, we are of the unanimous view that there was sufficient evidence to convict the appellant for an offence of culpable homicide not amounting to murder, which is punishable under s 304(a) of the Penal Code.

[44] To sustain a charge of murder, the prosecution must bring the case under any one of the four limbs of s 300 of the Penal Code. If the prosecution failed to discharge or established any one of the four limbs of s 300 of the Penal Code, the charge of murder would not have been made out and the case is probably one of culpable homicide not amounting to murder as described under s 299 of the Penal Code. It is important for the trial judge to have appreciated the distinction between the definitions of culpable homicide and murder under ss 299 and 300 of the Penal Code before deciding upon which offence to convict the appellant with.

[45] In the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, Raja Azlan Shah FCJ (as HRH then was) stated that, 'In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300 of the Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s 300 of the Penal Code, must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300 ...'.

[46] In the our present appeal, we are of the opinion that in view of the nature of the injuries sustained by the deceased and the conduct of the appellant, there was no evidence that the appellant had an intention to murder the deceased. However, there was evidence of an intention on the part of the appellant to cause bodily injury to the deceased.

[47] We were convinced that the defence's version of events raised a credible and reasonable doubt to the prosecution version of events and therefore accepted the same. The act of the deceased who jumped onto the appellant's car bonnet while it was moving and then fell off from the car when the car stopped/braked are consistent with the abrasions and bruises sustained by the deceased. The evidence presented by the pathologist, PW2 is also consistent with the deceased falling off the bonnet of the car when the appellant stated that he suddenly stopped/braked the car as there was a road bump ahead of him. PW2, in her evidence at pp 33–40 of volume two, record of appeal, stated that, in her opinion, the injuries sustained by the deceased could have been caused by something blunt and hard for example if the deceased was being hit by a blunt object such as wood, iron or any similar object or she fell onto something hard and blunt. That being the case, and taking her post mortem report (P7) which listed the number of abrasions and bruises on the deceased arms, elbows, fingers, feet and knees, we are of the view that it does not ruled out that the injuries were sustained from the falling effect of the deceased from the car when the car stopped/braked which injuries resulted in her death. Therefore, in light of this, the defence version had raised a credible and reasonable doubt to the prosecution's version.

[48] At the same time, we noticed that the learned trial judge had overlooked to evaluate the whole of the evidence adduced at the end of the defence case. In *Shah Rehan bin Abdul Rahman v Public Prosecutor* [2015] 3 MLJ 337, Balia Yusof Wahi JCA, (as His Lordship then was), had this to say on the similar issue at hand:

> [19] There are two aspects of the learned judge's consideration of the defence that merits our comment. Firstly, judges must again be reminded not to delve in the 'believable and convincing' test in applying the 'reasonable doubt' test. *It is trite that an accused person need only raise a reasonable doubt.* This was the reminder given by the Supreme Court in *Mohamad Radhi Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073; [1991] 1 CLJ Rep 311. The learned judge in the instant appeal found the appellant's defence story to be unbelievable and unconvincing. *While it is not wrong for His Lordship to conclude that the defence story is unbelievable/false and unconvincing, it is still incumbent on his part to consider whether the defence nevertheless had raised a reasonable doubt.*
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> [20] Secondly, it is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. *To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution's case* (per Mohamed Azmi SCJ in *Mohamad Radhi Yaakob v Public Prosecutor* at p 385).

A [21] While it is perfectly proper that a judge may view with suspicion or disbelieve the defence story, he is still bound to consider the defence however weak, and to acquit only if he is not satisfied that the prosecution had discharged the burden of proof which rests upon it.

B [22] It is trite law that the explanation given by an accused has to be considered together with the rest of the evidence in the case and that he will be entitled to an acquittal if as result of such explanation the existence of a material fact on which the prosecution relied is no longer so probable as to make a prudent man act upon the supposition that the fact exists (per Augustine Paul J (as he then was) in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 at p 683).

C [23] We are of the considered view that had the learned trial judge properly and sufficiently considered the explanation of the appellant in his defence and consider it together with the rest of all the evidence available, the probability of the defence story could not just be brushed aside. (Emphasis added.)

D **[49]** It is necessary to look at the degree of the appellant's mens rea, whether he had the intention to cause death or injuries that he knew were likely to cause death. In this appeal, the appellant and the deceased was having a serious argument regarding their relationship. The deceased suddenly knocked the mirror of the car and the appellant while slowly driving his car had suddenly E stopped the car as there was a road bump ahead of him which caused the deceased who had jumped on to the bonnet of the car to fall off the bonnet of the car onto the road and suffered the injuries. By looking at the act of the appellant in this incident, it can be concluded that there is nothing to show that the appellant has an intention to murder the deceased.

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[50] There was no evidence of intention other than what could be inferred from the act of the accused. That was no surprise, as it is difficult if not impossible to procure direct evidence to prove the intention of an individual (*Lee Fah Sang v Public Prosecutor* [1967] 2 MLJ 163; *Lim Heng Soon & Anor v* G *Public Prosecutor* [1970] 1 MLJ 166; *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84; *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265). Hence 'intention is a matter of inference' *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 at p 176, per Raja H Azlan Shah FJ (as HRH then was). Intention can be inferred from the act or conduct or other relevant circumstances of the case (*Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537). Intention to kill can be inferred from the nature of the injuries sustained by the deceased (*Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497).

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[51] From the conduct of the appellant which brought the deceased back to his house right after the incident, it can be inferred that he had no intention to cause the deceased's death. Thus, on a totality of the evidence, we found that the prosecution had failed to establish a prima face case under s 300 against the

appellant. In our considered view, the act of the appellant was that of an intention to cause such bodily injury that was likely to cause death. Hence the appellant's act fell squarely within s 299 of the Penal Code.

[52] There is no doubt that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the appellant for the offence with which he was charged. It never shifts. Whether the prosecution has proved its case beyond reasonable doubt depends upon the existence or otherwise of reasonable doubt in the evidence adduced before the court. It is a question of fact that the court has to determine at the conclusion of the trial with great care after taking into consideration the entire evidence and the circumstances prevailing in the case. In *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 MLRA 158, the Supreme Court said as follows:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. *Raising a reasonable doubt in the guilt of the accused will suffice*. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. *In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt?* ... (Emphasis added.)

[53] Having carefully scrutinized the evidence and the records of appeal and having carefully examined the judgment of the learned trial judge and the submissions of parties, we hereby allowed this appeal. We set aside the conviction for murder under s 300 and substitute it with culpable homicide not amounting to murder under s 304(a) of the Penal Code and sentenced the appellant to 18 years imprisonment with effect from the date of his arrest.

Order accordingly.

Ordered accordingly.

Reported by Mohd Kamarul Anwar